Nos. 77-1163, 77-1186

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

DR. E. RICHARD FRIEDMAN, *et al.*,
Appellants,
v.
DR. N. JAY ROGERS, *et al.*

TEXAS OPTOMETRIC ASSOCIATION, INC.,
Appellant,
v.
DR. N. JAY ROGERS, *et al.*

On Appeal from the United States District Court for the Eastern District of Texas

BRIEF FOR APPELLEES

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August 21, 1978

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BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the three-judge district court is reported at 438 F. Supp. 428, and is set out in the appendix to the jurisdictional statement filed by appellants Friedman *et al.* (A-6 through A-17).

JURISDICTION

The judgment of the district court was entered on October 27, 1977. Notices of appeal were filed by appellants Friedman *et al.* on December 20, 1977, and by the Texas Optometric Association, Inc. on December 22, 1977. The jurisdictional statements were filed on February 16, 1978 and February 21, 1978, respectively. Probable jurisdiction was noted on April 17, 1978, and these two appeals were consolidated with No. 77-1164. The jurisdiction of this Court rests on 28 U.S.C. §§ 1253 and 2101(b).

STATUTE INVOLVED

Pertinent provisions of the Texas Optometry Act are in the Statutory Appendix, *infra*.

QUESTIONS PRESENTED

1. Whether the provisions of the Texas Optometry Act imposing an absolute ban on the use of any trade name by optometrists, but not by opthalmologists and osteopaths: (a) unconstitutionally restrict the free flow of commercial information in violation of the First and Fourteenth Amendments; and (b) deprive optometrists of the equal protection of the laws in violation of the Fourteenth Amendment.

2. Whether it was proper for the district court to enjoin the enforcement not only of the specific provision of the Texas Optometry Act which expressly prohibits the use of a trade name, but also any other provision "which prohibits in any way the practice of optometry under a trade name."

STATEMENT

These are two of three consolidated appeals arising out of an action filed on August 25, 1975, by Dr. N. Jay Rogers, a member of the Texas Optometry Board, against

the other five Board members, challenging the constitutionality of certain provisions of the Texas Optometry Act, Tex. Rev. Civ. Stat. Art. 4552. The Texas Senior Citizens Association, Port Arthur Chapter, by its president, W. J. Dickinson, intervened as a party plaintiff, and the Texas Optometric Association, Inc., intervened as a party defendant.

The case was decided by the district court on the basis of the pleadings, depositions and other discovery materials, and the written and oral arguments of the parties. The court declared unconstitutional (as an infringement of free speech), and enjoined the enforcement of, two basic provisions of the Texas Optometry Act. Those provisions are:

(1) Section 5.09(a), which makes it unlawful for any optometrist to

> publish or display, or knowingly cause or permit to be published or displayed by newspaper, radio, television, window display, poster, sign, billboard, or any other advertising media, any statement or advertisement of any price offered or charged by him for any ophthalmic services or materials . . . .

(2) Section 5.13(d), which prohibits any optometrist from using

> in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas . . . .

The district court upheld the constitutionality of section 2.02, which requires that two-thirds of the members of the Texas Optometry Board—which regulates the practice of optometry under the Act—must be members of a state optometric association which is recognized by and affiliated with the American Optometric Association.

In these two appeals—Nos. 77-1163 and 77-1186—the defendant members of the Texas Optometry Board, as well as the intervenor Texas Optometric Association, have appealed from the portion of the district court's judgment invalidating the statutory prohibition of use of trade names. They have not appealed from the portion of the judgment invalidating section 5.09(a), the price advertising prohibition. In No. 77-1164, plaintiffs have appealed from that portion of the judgment upholding the constitutionality of section 2.02 relating to the composition of the Texas Optometry Board.[1]

Background

The Texas Optometry Act, enacted in 1969, was a legislative effort to resolve a controversy between two conflicting viewpoints as to how optometry should be practiced. In Texas, as throughout much of the nation, those who refer to themselves as "professional" optometrists oppose the use of any advertising or promotional practices in optometry. This point of view is represented by the Texas Optometric Association ("TOA"), an affiliate of the American Optometric Association ("AOA"). The other viewpoint, held by those whom the "professional" optometrists label "commercial" optometrists (such as appellee Rogers), favors the use of trade names, advertising, and similar practices. (A. 370, 417-20, 425-26.) The differences between these two viewpoints relate solely to the economic aspects of the practice of optometry, and not to the professional quality of care and treatment of patients. (A. 419, 374, 279-80.)

Prior to enactment of the 1969 statute, a prohibition against the use of trade names had been adopted by the

[1] A further issue in the court below was the constitutionality of section 5.15(e) which prescribes a mandatory colloquy between an optometrist and his patient regarding referral to a dispensing optician. This provision was upheld by the district court and no appeal has been taken from that portion of its decision.

Texas State Board of Examiners in Optometry in 1959, as part of that Board's "Professional Responsibility Rule." That prohibition was held by the Texas Supreme Court to be within the Board's delegated powers. *Texas State Board of Examiners in Optometry* v. *Carp*, 412 S.W.2d 307 (Tex.), *cert. denied*, 389 U.S. 52 (1967). The prohibition was repealed by the Board in 1967, based upon a mail ballot of its members. The validity of this action was challenged by members of the Texas Optometric Association, but the dispute was never finally resolved. (A. 206-11; Deposition of N. Jay Rogers taken April 6, 1976, at 73-92 (hereafter Rogers Dep. II).)

When the Texas Legislature convened in 1969, representatives of the two opposing factions met with various legislators in an effort to reach a compromise on a new optometry law. The resulting proposal was then adopted by the Legislature as the 1969 Texas Optometry Act (A. 229-33; Deposition of N. Jay Rogers taken January 13, 1976, at 80-81 (hereafter Rogers Dep. I).) Included in the Act was section 5.13(d), absolutely prohibiting the use of any trade name in connection with the practice of optometry.[2]

The Evidence Before the District Court

Appellee Rogers has been a licensed optometrist in Texas since 1939, and a member of the Texas Optometry Board for the past 23 years. Together with his associates he operates a large number of optometry offices throughout Texas under the trade name "Texas State Optical" or "TSO".[3] TSO has established certain practices and

[2] Section 5.13(k) of the 1969 Act provides that the effective date of the trade-name prohibition and certain other provisions of the Act is to be delayed with respect to any offices which were under lease as of April 15, 1969, until the expiration of such lease or January 1, 1979, whichever occurs sooner.

[3] Appellee and his associates operate more than 100 optometry offices in all. Of these, approximately 65 are currently permitted

policies that are followed at all of its offices and that have come to be associated with its trade name. These include provision of quality optometric service and quality materials at reasonable prices and on credit; re-examinations and continuous adjustments of frames and lenses without additional cost; optometric examinations without prior appointment; complete care at a single office; and —for those who move from one part of the State to another—ready transferability of a patient's records between TSO offices. (Rogers Dep. II, at 144-47.)

The use of the TSO trade name in no way serves to conceal the identity of the particular optometrists practicing in each office. Section 5.01 of the Act expressly requires that the optometrist's license must be displayed "in a conspicuous place" in his office, and section 5.12(b) requires "the optometrist's signature" to appear on each prescription he issues. In addition, TSO's policy is to display each optometrist's name on the door or window of his office. (Rogers Dep. II, at 160-61.)

The evidence showed that "professional" optometrists associated with TOA charge substantially higher fees than "commercial" optometrists. (A. 419-23, 257-60, 261-63, 271-73, 297, 283.) Dr. Rogers testified that the efforts by TOA to prohibit certain "commercial" practices in the field of optometry are intended to eliminate or reduce competition. The net effect of these restrictions, he stated, is to increase the cost of engaging in optometry practice—an increase which is passed on to patients (A. 425-26.) Dr. Rogers also pointed out that ophthalmologists and osteopathic physicians are permitted to practice under trade names. Like optometrists, members of these professions conduct ophthalmic examinations, prescribe lenses, and may dispense eye-glasses. (A. 423-24; Rogers Dep. 11, at 140-41.)

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to use the trade name "Texas State Optical," pursuant to the statutory exemption applicable to offices which have leases entered into prior to April 15, 1969. *See* note 2, *supra*. The other offices are not subject to this exemption, and therefore are prohibited by the statute from using a trade name.

The importance of trade names to the public was the subject of expert testimony by Dr. Lee Benham, an economist who has made a number of studies of the impact of advertising and related practices on the price and quality of various health services, including eye care. Dr. Benham testified that knowledge about trade names is "[o]ne of the most valuable assets which individuals have in this large mobile country," since their understanding of the services and prices associated with different trade names permits them to locate goods and services at reasonable prices with substantially lower search costs than would otherwise be the case. He stated that firms "have an enormous incentive to develop and maintain the integrity of the products and services provided under their trade name," since "the entire package they offer is being judged continuously by consumers on the basis of the samples they purchase." (A. 336.) Dr. Benham also noted that consumers have great difficulty in becoming knowledgeable and making judgments about differences in the quality and cost of goods and services offered by optometrists, so that any information they are able to obtain is of great assistance. He testified that restrictions on the use of trade names in optometric practice hinder consumers in making informed choices. When consumers are less informed, prices increase; and higher prices particularly disadvantage the poor and elderly in obtaining eyeglasses. (A. 336-37, 346-47.) Dr. Benham's studies found no evidence that the quality of eye care is lower in states that permit optometrists to use trade names and advertise than in states that do not. (A. 340, 348.)

In attempting to justify the statutory ban on the use of trade names by optometrists, appellants relied heavily

upon *Texas State Board of Examiners in Optometry* v. *Carp*, *supra*, a decision which preceded by two years enactment of the Texas Optometry Act of 1969. The opinion in that case referred to two instances of misrepresentation to the public—namely, the use by one chain enterprise of a variety of trade names to create the false impression that its different locations were in competition with one another, and the use of the name of one of the owning optometrists at offices where he did not actually practice. *See* 412 S.W.2d at 311-313.

No evidence whatever was offered by appellants that such abuses were not completely halted by the express prohibition in section 4.04(a)(2) of the Act outlawing false or deceptive practices. Nor did appellants make any effort to show that such deceptive practices could not be corrected short of an absolute ban on trade name usage, or that the use by an optometrist of a trade name is inherently misleading to the public or inconsistent with quality optometric care.

Much of the testimony offered by appellants was directed at other aspects of "commercial" optometric practice, particularly the advertising of optometric services (which, of course, need not necessarily involve the use of a trade name). For example, Dr. Shannon—one of appellants' chief witnesses—testified that the chain optical company in which he had been a partner prior to 1957 relied on advertising to generate a high volume of patients who were seen on a no-appointment basis, and, as a result, that the optometrists employed by his company did not always have sufficient time with each patient to provide a quality examination. (A. 106-07, 125, 142-43.)[4] Referring to practices that had occurred

[4] Dr. Shannon acknowledged that the situation improved after the State Board adopted a Basic Competency Rule. This Rule specified the tests that must be performed by an optometrist and had the effect of requiring the optometrists in Dr. Shannon's organization to spend more time with their patients. (A. 128.)

more than a decade before the 1969 Act became law, he stated that frequently the optometrist in a local office of his company failed to take time personally to check the lenses received from a laboratory to verify that the prescription had been properly compounded, generally leaving that to an unlicensed office assistant. (A. 109-10.) Dr. Shannon admitted that he had no objection to advertising or a high volume of practice "provided that the optometrist is able to give an honest and true service to the patient" (A. 173), and observed that at one time his own organization had provided very fine services, the quality of which began to deteriorate only when it allowed volume and profit to become predominant concerns. (A. 136-37.)

Two of the defendant Board members also admitted that "commercial" optometrists are fully capable of providing proper optometric care and that their dispute with such optometrists was based only upon their business practices. Thus, Dr. Friedman testified that there would be a difference between a "professional" optometrist and a "commercial" optometrist only if the latter were seeing more patients than could be given adequate care, and that he would expect to receive the same proper examination and prescription in Dr. Rogers' office as he would in his own. (A. 373-74.) Similarly, Dr. Mora stated his belief that there is at present no dispute between the two factions over the proper way to examine a patient's eyes or the prescription that should be provided for a particular eye disorder. (A. 279-80.) Their views thus accorded with those of Dr. Rogers, who testified that there is no difference in the quality of service provided to the public by the two groups of optometrists, and that both groups use the same quality of products, provided by the same suppliers and laboratories. (A. 421-22; Rogers Dep. II at 150.)

The District Court's Decision

Applying the rationale of this Court's recent professional advertising cases,[5] the district court held that "blanket suppression of the use of trade names results in unwarranted restriction of the free flow of commercial information and therefore represents an unconstitutional violation of the first amendment." (Appendix to Jurisdictional Statement of appellants Friedman *et al.*, A-10, 11.)

Rejecting appellants' contention that use of trade names by optometrists would impair the doctor-patient relationship, lead to deterioration of the quality of eye care, and permit the concealment of an optometrist's identity and encourage deception and misrepresentation, the court found appellants' claims to be factually unsupported by the evidence. (*Id.* at A-8.) The court specifically rejected the contention that use of the Texas State Optical name misleads the public as to who is the responsible optometrist. It noted that its ruling "does not prohibit or invalidate regulations having to do with the posting of the optometrists' names present, or the requirement that those optometrists whose names are posted work so many hours per week at their place of business." (*Id.* at A-11 n.3.)[6]

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[5] *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

[6] A separate provision of the statute, section 5.01, requires that "[e]very person practicing optometry in this state shall display his license or certificate in a conspicuous place in the principal office where he practices . . . and whenever practicing . . . outside of, or away from, said office . . . [to] deliver to each person fitted with glasses a bill, which shall contain his signature . . . and the number of his license or certificate." This provision of the statute has not been challenged. Thus, even without the trade name prohibition, optometrists would be required prominently to display their personal names and licenses.

The court accordingly declared section 5.13(d) of the Texas Optometry Act to be unconstitutional insofar as it provides that no optometrist may use "any assumed name, corporate name, trade name or any name other than the name under which he is licensed to practice optometry in Texas," and enjoined the Texas Optometry Board from enforcing that provision "or any other provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under a trade name." (*Id.* at A-3.)

SUMMARY OF ARGUMENT

I.

The Texas Optometry Act's blanket ban on the use of trade names by optometrists is an unconstitutional abridgement of their freedom of speech. That commercial speech is protected by the First Amendment has now been firmly established by decisions of this Court. Trade names, like other forms of protected commercial speech, communicate information to the public. They enable consumers more readily to locate, and more intelligently to choose among, providers of goods and services. The trade name "Texas State Optical," which appellee Rogers has adopted, is the only effective means by which appellee can identify to the public the optometry offices which are part of his organization, and at which the particular type and quality of care associated with that trade name are available.

Contrary to the contentions of appellants and the amicus curiae, the trade name prohibition is not a regulation of business conduct, but is a direct restraint on commercial communication. The Texas statute does not preclude an optometrist from owning multiple offices or employing other optometrists. It does not limit the number of patients which an optometrist may treat. The

standards of care that must be provided by optometrists are regulated by separate provisions of the Act that are not challenged or in issue here. The sole effect of the trade name ban is to prevent appellee Rogers (or any other optometrist) from using a trade name as a means of identifying his offices and informing the public that they are part of a single organization that adheres to certain uniform policies and practices.

There is also no merit in appellants' contention that the trade name prohibition is justifiable as a means of promoting high professional standards, preventing deception, or insuring that an optometrist's identity is disclosed to his patients. The use of a trade name is not inconsistent with these goals. The evils which appellants claim the trade name ban is designed to remedy can be dealt with more effectively by other means which do not abridge freedom of speech. Indeed, virtually all of them are already regulated in other provisions of the Texas Optometry Act which are not challenged here.

The mere fact that a trade name may be used in a deceptive manner does not justify a blanket ban on all trade names. There are numerous other provisions of the Act which prohibit such deception. Even before this Court extended First Amendment protection to commercial speech, governmental remedies for false or misleading advertising or deceptive trade name use were invalidated if found to go further than necessary to eliminate the deception.

Nor does the trade name prohibition promote higher quality eye care. There is not a shred of evidence that the mere use of a trade name is inherently inconsistent with the maintenance of high professional standards. Empirical studies have disclosed no differences in the quality of eye care between states which permit the use of a trade name and those which prohibit it. In Texas, high professional standards are assured by detailed pro-

visions of the Act defining the moral and educational qualifications for obtaining an optometrist's license, prescribing the specific steps required for any optometric examination, and establishing grounds and procedures for revoking licenses.

The trade name prohibition is not a means of assuring that a patient knows the name of his optometrist. A separate provision of the Act requires every optometrist to display his license in a conspicuous place in his office, and, when he is practicing outside his office, to provide each patient with a bill containing his signature and license number. An optometrist uses a trade name not instead of, but in addition to, his own name, as a means of disclosing his legitimate affiliation with other optometrists.

Appellants attempt to analogize the trade name ban to other statutes that have been upheld as legitimate restraints on the "time, place or manner" of speech. The statute at issue here, however, restricts the content of speech, not its time, place or manner. Moreover, even "time, place or manner" restrictions are invalid unless they serve a significant governmental interest, are narrowly tailored to further that interest, and leave open ample alternative standards for communication. None of these standards is met by the prohibition at issue here.

Finally, the trade name ban, because it applies only to optometrists and not to ophthalmologists and osteopaths, also violates the Equal Protection Clause of the Fourteenth Amendment. A statutory classification which trenches upon a fundamental right such as freedom of speech must not only have a "rational basis" or be related to some valid state interest. It must be *necessary* to the promotion of a *compelling* state interest. If, as appellants contend, the use of a trade name somehow leads to inferior eye care, deceptive practices or concealment of the individual practitioner's identity or reputa-

tion, then *all* practitioners who render eye care should be subject to the ban. Certainly there is no compelling reason why only the free speech of optometrists should be restricted in this fashion.

II.

The district court properly enjoined the enforcement not only of section 5.13(d) of the Act, which expressly prohibits use of a trade name, but also "any other provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under a trade name." The latter portion of the injunction was necessary to afford complete relief and put the entire trade name controversy to rest.

If only enforcement of section 5.13(d) had been enjoined, the Texas Optometry Board might attempt to construe some other provision of the Act to bar trade name use by optometrists. While section 5.13(d) is the only provision which expressly prohibits trade names, other sections might be interpreted as containing such a prohibition by implication. The broad order issued by the district court properly prevents appellants from attempting to apply any provision of the Act in a manner which would circumvent the court's judgment. Contrary to appellants' contention, the injunction does not block the enforcement of any other, legitimate prohibition in the statute.

ARGUMENT

I.

TEXAS' BLANKET BAN ON THE USE OF TRADE NAMES BY OPTOMETRISTS UNCONSTITUTIONALLY INFRINGES THEIR FREEDOM OF SPEECH AND DENIES THEM EQUAL PROTECTION OF THE LAWS

Section 5.13(d) of the Texas Optometry Act flatly forbids the use of "any assumed name, corporate name, trade name" in connection with the practice of optometry. The district court held this prohibition to be violative of the First Amendment. Reasoning from *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) and *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), the court concluded that because trade names are a means of communicating "to the consuming public information as to certain standards of price and quality, and availability of particular routine services" provided by optometrists, their use comes within the constitutional protection of commercial speech. The court found no support for appellants' claims that an absolute ban on trade name use by optometrists is necessary to preserve high professional standards, to prevent deceptive practices, or to insure disclosure of an optometrist's identity to patients. Accordingly, it held that the "blanket suppression of the use of trade names results in unwarranted restriction of the free flow of commercial information," in violation of the First Amendment.

Virginia State Board and *Bates* fully support the decision below. Trade names communicate information to the public. Trade names permit consumers more readily to locate, and more intelligently to choose among, providers of goods and services. Like the price information held protected in *Virginia State Board* and *Bates*, trade names

facilitate efficient allocation of resources through informed private economic decisionmaking, and thus are a constitutionally protected form of commercial communication.

Further, the restriction of commercial speech at issue here cannot be sustained as a permissible regulation of business conduct or professional standards, and is not justified by any overriding state interest. It imposes a direct, absolute, and unjustified restraint on truthful communication concerning lawful activity. As applied to appellee Rogers, the Act prohibits use of a trade name specifically held by the district court—in a finding not challenged here—to be entirely free from deception. So bald and drastic a ban on commercial speech cannot stand under the First Amendment.

A. Trade Name Use is Constitutionally Protected Commercial Speech

In 1969, when the Texas Optometry Act was enacted, commercial speech was not thought to be protected by the First Amendment. *See Valentine* v. *Chrestensen*, 316 U.S. 52 (1942). It is clear today that commercial communication enjoys constitutional protection. *See Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977); *Carey* v. *Population Services International*, 431 U.S. 678 (1977); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). As this Court has held, the free flow of commercial information is a matter of vital First Amendment concern both to individuals and to the society as a whole. The consumer's interest in such information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia State Board, supra*, 425 U.S. at 763. Significant societal interests are advanced by unrestrained commercial speech since it "serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." *Bates, supra*, 433 U.S. at 364. Even a communication which does "no more than propose a commercial transaction" is protected by the First Amendment. *Virginia State Board, supra*, 425 U.S. at 762, *quoting Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376, 385 (1973).

Like the other forms of commercial communication this Court has held to be constitutionally protected, *see Virginia State Board, supra* (prescription drug advertising); *Bates, supra* (advertising of legal services); *Carey* v. *Population Services International, supra*, (contraceptive advertising); *Linmark Associates, Inc.* v. *Township of Willingboro, supra* (real estate "for sale" and "sold" signs), trade name use furthers "individual and societal interests in assuring informed and reliable decisionmaking" by the consuming public. *Bates, supra*, 433 U.S. at 364. The record in this case contains compelling and uncontradicted expert evidence that the information communicated by trade names is "one of the most valuable assets which [consumers] have in this large mobile country." (A. 336.) Dr. Lee Benham,[7] a

[7] Dr. Benham is an associate professor in the Department of Economics and an associate professor of economics in preventive medicine in the Medical School at Washington University. (A.331). His numerous publications include *The Effect of Advertising on the Price of Eyeglasses*, 15 J. Law & Econ. 337 (1972), cited in *Bates* v. *State Bar of Arizona, supra*, 433 U.S. at 377 n.34 and *Regulating Through The Professions: A Perspective on Information Control*, 18 J. Law & Econ. 421 (1975). Dr. Benham's analyses of the impact of information restraints on eyeglass prices were heavily relied upon by the Federal Trade Commission in promulgating its recent ruling prohibiting state restraints on the advertising of ophthalmic goods and services. The Commission concluded "that the Benham data is reliable and in conjunction with other economic evidence provides a sound empirical base on which to promulgate this rule." 43 Fed. Reg. 23995 (June 2, 1978).

leading economist who has extensively studied the effects of advertising on the price and quality of eye care, testified:

> Consumers develop a sophisticated understanding of the goods and services provided and the prices associated with different trade names. This permits them to locate the goods, services, and prices they prefer on a continuing basis with substantially lower search costs than would otherwise be the case . . . . This also means that firms have an enormous incentive to develop and maintain the integrity of the product and services provided under their trade name: the entire package they offer is being judged continuously by consumers on the basis of the samples they purchase.
>
> If there were no trade names, individuals would have much greater difficulty obtaining information about the range of providers. They might know the providers in the given community well, but if they moved or if some of the providers moved, the problems of acquiring new information would face them . . . . (A. 336.)
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> * * * *
>
> The trade name provides information about where consumers can go if they like the service. (A. 338.)
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> * * * *
>
> Restrictions on the use of the trade name would mean that consumers are less well informed about their options. (A. 336.)

But there is scarcely need for expert testimony to confirm the communicative role of trade names. One need only think of such names as "Hilton," "Sears" or "Volkswagen" to appreciate the indispensable informational function they serve. These names, like all trade names with which the public has grown familiar, connote a certain mix of price, quality, and service elements that

affect intelligent consumer choice. By transmitting information about those elements in short-hand, symbolic form, trade names enable consumers readily, efficiently, and therefore cheaply, to find sources of goods or services that best fit their needs and budgets. In a vast and complex economy like ours, no other means of identifying a business enterprise is as convenient as a trade name.

At the same time, trade name use promotes a more efficient allocation of economic resources: like a trademark, it "makes effective competition possible in a complex, impersonal marketplace by providing a means through which the consumer can identify products which please him and reward the producer with continued patronage. Without some such method of product identification, informed consumer choice, and hence meaningful competition in quality, could not exist." *Smith* v. *Chanel, Inc.*, 402 F.2d 562, 566 (9th Cir. 1968) (footnote omitted).

Many organizations which provide professional services operate under some form of trade, firm, or corporate name, and in the professional sphere, as elsewhere, such names serve an important informational function. In the medical field, hospitals have always used names such as Mayo Clinic or Washington Hospital Center, and medical group-practice plans also commonly use corporate names (*e.g.*, Group Health Association in Washington, D.C., or Kaiser Permanente Foundation in California). Law firms often use the names of founding partners, even after they have died or retired (*e.g.*, Covington and Burling), and the same is true of accounting firms (*e.g.*, Peat, Marwick, Mitchell & Co., Arthur Andersen & Co.). The people working in these organizations are constantly changing and may not be known to the public, but the name of the organization itself *is* known and is associated in the public mind with certain standards of service, quality and price.

The use of a trade name is particularly important to a professional organization which has multiple offices in different cities. For example, a large national accounting firm must use a single name to communicate to the public the fact that all of its many offices are part of one organization, and adhere to a single standard of service and price.

Appellee Rogers, together with his associates, has for many years operated a large number of optometry offices located throughout Texas under the name "Texas State Optical" or "TSO." These offices adhere to certain uniform standards and policies as to quality of service, price, credit, transferability of patient records between offices, availability of examinations without prior appointments, free adjustment of eyeglasses and frames, and other matters. Appellee's trade name has come to be identified with these standards and policies. The use of that name is a simple and effective means by which appellee can identify to the public the offices which are part of his organization, and at which the "TSO" standard of service and care is available.[8] The trade name also enables a person who has received satisfactory service from one of appellee's offices to find another such office in a different neighborhood or a different city.

In sum, trade names—whether used in connection with the practice of optometry, the practice of other professions, or purely commercial enterprises—advance the same interests identified by this Court in *Virginia State Board* and *Bates* as meriting First Amendment protection. They are a means of conveying information as to

[8] Under Texas law, it is also the *only* such means. The statute not only prohibits the use of a trade name, but also prohibits an optometrist from using his own name in an office in which he does not personally practice. (Section 5.13(e).) Thus, appellee cannot use any single name, even his own, to identify all of the offices which are under his ownership or management, and which pursue the standards and policies of the TSO organization.

the source, quality, and price of goods or services, thereby facilitating consumer choice among competing providers and promoting the efficient distribution of economic resources. *Virginia State Board* and *Bates* leave no doubt that trade name use is commercial speech deserving constitutional protection.

B. The Trade Name Prohibition Does Not Regulate Business Conduct, But Directly Suppresses Speech

Appellants and the American Optometric Association ("AOA"), as amicus curiae, contend that Texas' total ban on trade name use by optometrists is constitutionally distinguishable from the restrictions on commercial communication by professionals already invalidated by this Court. They argue, first, that unlike the provisions involved in *Virginia State Board* and *Bates*, section 5.13(d) is a regulation of business conduct, not speech. The statute at issue here, they say, does not block the flow of commercial information, but rather "bars an entire form of business organization and conduct." (Amicus Brief at 7.) As described by the AOA, "this conduct consists of a form of business organization where a trade name owner employs individual optometrists and may often control the volume of patients they treat." (Amicus Brief at 3.) According to appellants, "this mode of practicing, more often than not, includes a high volume practice which tends to lead toward poor quality patient care." (State Brief at 18.)

These arguments, however, are fatally flawed, for the "form of business organization and conduct" that appellants and AOA find offensive is in no way prohibited by the provision at issue here, nor, indeed, by any other provision of Texas law. Section 5.13(d) prohibits trade name use—nothing more and nothing less. Neither it nor any other provision of the Texas Optometry Act sets a limit on the number of offices that an optometrist may

own. Neither it nor any other provision sets a limit on the number of optometrists that may be employed. Neither it nor any other provision sets a limit on the number of patients that an optometrist may treat. The standards of care that must be provided by optometrists are regulated by the Act in specific provisions not here challenged or in issue. Section 5.13(d) has nothing to do with these other provisions.

Indeed, the very mode of activity to which appellants apparently object is affirmatively authorized by other provisions of the Texas Optometry Act:

> This Act does not prohibit an optometrist from being employed on a salary . . . by a licensed optometrist . . . regardless of the amount of supervision exerted by the employing optometrist . . . over the office in which the employed optometrist works . . . . (Section 5.13(c).)
>
> * * * *
>
> . . . a licensed optometrist . . . [may] have, own, or acquire [an] interest in the practice, books, records, files, equipment, or materials of a licensed optometrist, or have, own, or acquire [an] interest in the premises or space occupied by a licensed optometrist for the practice of optometry . . . . (Section 5.15(d).)[9]

That the trade name prohibition is not a regulation of modes of commercial organization or professional conduct is perhaps best indicated by two hypothetical examples of its application:

1) The case of *Dr. Smith.* Dr. Smith is an optometrist who uses no trade name in connection with his business but who owns more than one hundred offices and employs nearly a thousand optometrists who treat patients each day at a rate of six patients per hour. *No violation of section 5.13(d).*

[9] As previously noted, the 1969 Texas Optometry Act represented a compromise reached by the opposing "professional" and "commercial" optometrists.

2) The case of *Dr. Jones.* Dr. Jones is a sole practitioner who owns no offices other than his own, who employs no optometrist other than himself, and who sees only four patients per day, examining each for two hours. Dr. Jones calls his office "Lone Star Optical." *Section 5.13(d) is violated.*

In light of these examples, appellants' and AOA's characterization of section 5.13(d) as regulating business conduct rather than speech is hard to understand. The supposed "sphere of conduct by optometrists, separate from speech, that is . . . banned by the Texas 'trade name statute'" (Amicus Brief at 7) reflects merely the rhetoric of counsel, not the reality of Texas law. What section 5.13(d) actually and directly proscribes is pure communication, not conduct, nor even some combination of the two.

Moreover, it is communication concerning *lawful* activity that this statute seeks to silence. Appellants and AOA struggle to analogize this case to *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), where advertisements proposing illegal commercial activity—sex discrimination in employment—were held to be outside First Amendment protection. They claim that since section 5.13(d) prohibits "trade name conduct," its "incidental" suppression of trade name use is simply a permissible ban "on the advertising of illegal conduct." (Amicus Brief at 7.) Here, however, there is no illegal conduct involved to which section 5.13(d)'s ban on trade name use could be deemed "incidental." It is directed at communication alone. The statute does not prohibit Dr. Rogers (or any other optometrist) from owning numerous offices and operating them as a single enterprise. It does prohibit him from using a trade

name as a means of identifying his offices and informing the public that they are part of a single organization, having uniform standards and policies concerning the cost and quality of service and products. It prohibits speech, pure and simple, and should be judged as such.

C. The Trade Name Prohibition Cannot Be Justified by Any Overriding State Interest

Appellants also contend that even if the trade name ban suppresses speech protected by the First Amendment, the statute is nevertheless constitutional because it serves overriding state interests. Absolute prohibition of trade name use is necessary, they argue, to preserve high standards of professionalism in the practice of optometry, to prevent deception of the public by optometrists using trade names, and to insure that an optometrist's identity is known to his patients.

This Court has made clear that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP* v. *Button*, 371 U.S. 415, 439 (1963). Even regulations which impinge only indirectly on freedom of speech are unconstitutional if there are "less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960) (footnote omitted). To pass muster under the First Amendment, a regulation must not only further "an important or substantial governmental interest . . . unrelated to the suppression of free expression," but any "incidental restriction" on free speech resulting from the regulation must be "no greater than is essential to the furtherance of that interest." *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968).

The statutory prohibition on trade name use is hardly "essential" to the achievement of any of the goals which appellants attribute to it. Indeed, there is no connection between the use of a trade name and the various evils

which appellants claim the statute is designed to remedy. And, in any event, those evils can be remedied far more effectively by regulations which deal with them directly, and do not abridge freedom of speech. In fact, virtually all of them are already regulated in other provisions of the statute which are not challenged here.

1. *Section 5.13(d) is not a permissible exercise of state power to prohibit deceptive practices*

Appellants contend that Texas' unqualified prohibition on optometrists' trade name use is justified because there have been some past instances of deception engaged in by optometrists who use trade names. The sole support offered for this claim is the opinion in *Texas State Board of Examiners in Optometry* v. *Carp*, 412 S.W.2d 307 (Tex.), *cert. denied*, 389 U.S. 52 (1967), describing certain abuses by some individual optometrists—specifically, the use of the name of an optometrist at an office where that optometrist did not actually practice, and the use of several different trade names to disguise the connection between offices owned by a single optometrist. From the discussion by the *Carp* court, it is argued that an absolute blanket ban on trade name use is necessary and constitutionally permissible.

That conclusion is a *non sequitur*. In the first place, regulation of the practice of optometry in Texas has undergone radical change since 1967, when *Carp* was decided. Two years after *Carp*, the Texas Optometry Act was passed. In provisions of the Act not at issue here, and in other subsequent legislation, the state has directly proscribed the deceptive practices described in that case. Thus, section 5.13(e) forbids an optometrist to "use, cause or allow to be used, his name . . . on or about the door, window, wall, directory or any sign or listing whatsoever, of any office, location or place where optometry is practiced, unless said optometrist is actually

present and practicing optometry therein. . . ." More generally, section 4.04(a)(2) makes "any fraud, deceit, dishonesty, or misrepresentation in the practice of opotmetry . . ." a ground for license revocation or suspension; and section 5.04(1) makes it unlawful for any person to "falsely impersonate any person duly licensed as an optometrist . . . or to falsely assume another name." Further, in its Deceptive Trade Practices-Consumer Protection Act of 1973, Texas has specifically prohibited, among other misleading commercial practices, "causing confusion" as to the "source, sponsorship, approval, or certification of . . . services" or as to "affiliation, connection or association with, or certification by another." Tex. Bus. & Comm. Code, § 17.46(b)(2), (3). Against this regulatory background, the claim that section 5.13(d) is necessary to protect Texas citizens against deception is completely deflated.

In any event, the imposition of a blanket ban on optometrists' trade name use is far more drastic than any problem of deception warrants and than the First Amendment permits. To prohibit all trade name use by optometrists because of the fear that a few practitioners who use them might engage in deception is to "burn the house to roast the pig." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957). The First Amendment forbids such statutory overkill.[10]

Even before this Court took commercial speech into the First Amendment's protective fold, governmental remedies for false or misleading advertising or deceptive trade name use were invalidated if found to go further than necessary to eliminate the deception. *FTC* v. *Royal*

[10] Pharmacists are also professionals. No one would seriously suggest that the deceptive use of trade names by some pharmacists would justify a state law banning all pharmacists from practicing their profession under the trade name of the drug store by which they are employed.

Milling Co., 288 U.S. 212 (1933), is illustrative. At issue there was the validity of FTC orders forbidding the use of certain trade names the agency had found deceptive. While sustaining the Commission's findings that the names in question were misleading, this Court nevertheless held the remedial orders improper, since

> the commission went too far in ordering what amounts to a suppression of the trade-names. These names . . . constitute valuable business assets . . ., the destruction of which probably would be highly injurious and *should not be ordered if less drastic means will accomplish the same result. The orders should go no further than is reasonably necessary to correct the evil* . . .; and this can be done . . . by requiring proper qualifying words to be used in immediate connection with the names. (*Id.* at 217 (emphasis added).)

See also Jacob Siegel Co. v. *FTC*, 327 U.S. 608 (1946); *Elliott Knitwear, Inc.* v. *FTC*, 266 F.2d 787 (2d Cir. 1959). *Cf. Talley* v. *California*, 362 U.S. 60 (1960) (overturning ordinance that forbade distribution of any handbill not bearing name and address of person who prepared, distributed, or sponsored it; defense that ordinance could help identify those responsible for false advertising rejected since ordinance went further than necessary to achieve this goal).

Surely the scope of permissible regulation to remedy deception in commercial speech has not been expanded by this Court's recent decisions extending constitutional protection to such speech. *See, e.g., Beneficial Corp.* v. *FTC*, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977) (total ban on words "Instant Loan Refund" in loan advertisement impermissible where less drastic means to guard against deception are available). *See also Warner-Lambert Co.* v. *FTC*, 562 F.2d 749, (D.C. Cir. 1977), *cert. denied*, 98 S.Ct. 1575 (1978); *Fur*

Information and Fashion Council, Inc. v. *E. F. Timme & Son, Inc.*, 364 F. Supp. 16 (S.D.N.Y. 1973), *aff'd*, 501 F.2d 1048 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974); *Anderson, Clayton & Co.* v. *Washington State Department of Agriculture*, 402 F. Supp. 1253 (W.D. Wash. 1975) (three-judge court) (ban on ads comparing margarine with butter impermissible where less drastic means to prevent deception are available). *Cf. Chrysler Corp.* v. *FTC*, 561 F.2d 357, 364 (D.C. Cir. 1977) (FTC order to eliminate misleading advertising modified to reach only the specific violations found). We submit that Texas' sweeping suppression of trade name use goes far "further in imposing a prior restraint on protected commercial speech than is reasonably necessary to accomplish the remedial objective . . . ." *Beneficial Corp.* v. *FTC*, *supra*, 542 F.2d at 619.

2. Section 5.13(d) does not promote higher quality eye care

Appellants assert that "certain evils," such as "emphasis on volume rather than quality in patient care" and "[omission of] necessary steps in an examination" would be "more prevalent" if trade name use by optometrists were permitted. (State Brief 24.) Texas' blanket trade name ban, it is argued, is necessary "to ensure that commercial pressures do not undercut the provision of high quality eye care." (Amicus Brief at 8.) But this contention cannot survive even minimal scrutiny, much less the careful scrutiny that the First Amendment mandates.

To begin with, there is no connection between trade name use and inferior patient care. There is not a shred of credible evidence in the record to prove what logic rejects, namely, that the mere use of a trade name —*any* trade name—is inherently, or typically, inconsistent with an optometrist's adherence to high professional

standards. On the contrary, the record contains compelling evidence negating the existence of any correlation between trade name use and poor quality ophthalmic service. For example, Dr. Benham testified that his extensive empirical research uncovered no evidence whatsoever that the quality of eyecare is lower in states permitting optomtrists to use trade names than in those prohibiting trade name use. (A. 340, 348.)

Even if, as appellants claim, the quality of patient care tends to suffer in a multi-office, high-volume practice, section 5.13(d) is not addressed to, and would be a patently ineffective remedy for, any such problem. As we have demonstrated above, this provision leaves an optometrist completely free to own as many offices, to employ as many optometrists, and to treat as many patients as he pleases. The only freedom section 5.13(d) abridges is an optometrist's freedom to disclose, through the use of a trade name, his legitimate affiliation with other offices and other optometrists, and to disseminate, through the use of a trade name, information enabling consumers to make more efficient and intelligent choices among providers of eye care. The direct deprivation of this freedom, the freedom of speech guaranteed by the First Amendment, operates with the same severity upon the most conscientious and skilled optometrist as upon the most derelict and incompetent.

Other provisions of the Texas Optometry Act subject optometrists to close regulation aimed directly at preserving high professional standards and high quality patient care. For example, an optometrist must meet carefully prescribed educational standards, pass a rigorous examination, and present sworn evidence of his good moral character in order to obtain a license to practice in Texas. (Sections 3.01, 3.02, 3.05.) Once licensed, optometrists must fulfill continuing education requirements as a condition of license renewal (section 4.01B), and

may have their licenses revoked or suspended for any of a long list of infractions including unfitness or incompetence "by reason of negligence" (section 4.04(a)(3)) and "fraud, deceit, dishonesty, or misrepresentation in the practice of optometry." (Section 4.04(a)(2).) Perhaps most importantly, "in order to insure an adequate examination" of each patient, the Act prescribes specific steps which optometrists must follow in conducting examinations (section 5.12), and forbids them to "sign, or cause to be signed, a prescription for an ophthalmic lens without first making a personal examination of the eyes of the person for whom the prescription is made." (Section 5.07.) An optometrist's omission of any of the necessary examination steps may be evidence of negligence and may lead to permanent or temporary loss of his license. (Section 5.12.)

That Texas has power to preserve high standards of professional conduct and patient care through provisions such as these, which serve the state's interest directly and which impose no unnecessary restraint on First Amendment freedom, is not disputed. What we contend, and what *Virginia State Board* and *Bates* teach, is that a state may not pursue the goal of high quality professional service through wholesale suppression of legitimate commercial speech when more direct and effective means are available. Where, as here, the speech restraint is sweeping and utterly unrelated to the asserted governmental objectives, the limits of permissible regulation are plainly exceeded.

3. *Section 5.13(d) serves no purpose in communicating an optometrist's identity to his patients*

Appellants assert that section 5.13(d) is necessary to insure that a patient knows the name of his optometrist. This argument, also, is fatally flawed. It overlooks the fact that section 5.01 of the Texas Optometry Act ex-

pressly serves that purpose. Section 5.01 requires "[e]very person practicing optometry in this state [to] display his license or certificate in a conspicuous place in the principal office where he practices . . . and whenever practicing . . . outside of or away from said office . . . [to] deliver to each person fitted with glasses a bill, which shall contain his signature . . . and number of his license or certificate . . . ." As the district court concluded, the use of a trade name is in no way inconsistent with this requirement, or any other affirmative disclosure obligations that Texas may wish to impose. An optometrist uses a trade name not *instead of*, but rather *in addition* to his own name. Trade name use simply entails the *supplemental disclosure* of an optometrist's legitimate affiliation with other optometrists. By prohibiting such disclosure, section 5.13(d) scarcely "assures that *more* information will be conveyed to the consumer than might otherwise be the case." (TOA Brief at 32.) That description stands section 5.13(d) on its head. The trade name ban assures that *less* information will be conveyed to the consumer, and that persons seeking eye care will be deprived of information that facilitates more efficient and intelligent choices among providers of ophthalmic services.

4. *Section 5.13(d) is not a mere "manner" restraint of communication, but an absolute, content-based ban on protected speech*

Finally, it is argued that Texas' blanket trade name ban comports with the First Amendment because it is merely a "manner" restriction of free expression. This claim, like the others advanced in section 5.13(d)'s support, is wholly without merit.

The statute at issue here does not bear the slightest resemblance to those this Court has upheld as mere "time, place or manner" restrictions. *See, e.g., Kovacs* v. *Cooper*, 336 U.S. 77 (1949); *Grayned* v. *City of Rock-*

ford, 408 U.S. 104 (1972); *Adderley* v. *Florida*, 385 U.S. 39 (1966). Such restrictions are earmarked by their neutrality as to the content of the regulated speech and by their limited scope. Even where commercial communication, rather than some other form of speech, is the subject of regulation, a statute cannot qualify as a "time, place or manner" restriction if it "singles out speech of a particular content and seeks to prevent its dissemination completely." *Virginia State Board*, *supra*, 425 U.S. at 771. Yet section 5.13(d) does precisely that: it prohibits communication of a particular commercial content and prohibits it absolutely.

In any event, even if the Texas trade name ban could be classified as a "manner" restriction, appellants' claim that this provision satisfies the First Amendment still would have to be rejected. A statute so classified is not automatically constitutional. Rather, the state must shoulder the burden of establishing: (1) that the regulation serves a significant governmental interest, (2) that it is narrowly tailored to further that interest, and (3) that it leaves open ample alternative channels for communication of information. *See Virginia State Board*, *supra*, 425 U.S. at 771; *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 116-117. Section 5.13(d) satisfies none of these standards.

As we have already shown, the trade name ban does not serve any governmental interest which cannot be more effectively advanced by other means not affecting freedom of speech. And there is no effective method other than the use of a trade name by which an optometric organization such as Texas State Optical can inform the public of the identity and location of the offices which it operates, and at which professional services and goods of the quality and cost associated with its name are available.

D. By Restricting The Freedom of Speech of Optometrists But Not Ophthalmologists And Osteopaths, The Statute Also Violates The Equal Protection Clause

Even if the statute could fairly be said to serve the objectives which appellants attribute to it—and, as shown above, it clearly cannot—it would still suffer from another fatal defect. The ban on trade name use in section 5.13(d) applies only to optometrists. It does not apply to ophthalmologists and osteopaths, whose services include the same kind of eye care provided by optometrists.[11] This discriminatory feature of the statute, which has the effect of restricting the freedom of speech of one class of practitioners while imposing no equivalent restriction on others similarly situated, violates the Equal Protection Clause of the Fourteenth Amendment.

A statutory classification which trenches upon a fundamental right such as freedom of speech "must meet close constitutional scrutiny." *Evans* v. *Cornman*, 398 U.S. 419, 422 (1970). In such a situation, "[i]t is not sufficient for the State to show that [the statute furthers] a very substantial state interest." *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972). *Cf. Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483 (1955) (rational basis standard applied where statutory classification was treated as not affecting any fundamental right).[12] The classification, to be valid, must "be necessary to promote a *compelling* governmental interest . . . ." *Shapiro* v. *Thompson*, 394

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[11] Like optometrists, ophthalmologists and osteopaths "examine eyes for the absence or presence of any defect or disease," "refract the patient to determine whether or not a prescription for glasses or contact lenses [is] needed," prescribe and "in some instances" dispense glasses or contact lenses. Some have their own dispensing offices. (Rogers Dep. II, at 140-41.)

[12] In 1955, when *Williamson* was decided, commercial speech was not deemed to be protected by the First Amendment. *See Valentine* v. *Chrestensen*, *supra*; *Virginia State Board*, *supra*, 425 U.S. at 769.

U.S. 618, 634 (1969) (emphasis in original). These "key words emphasize . . . that a heavy burden of justification is on the State." *Dunn* v. *Blumstein*, *supra*, 405 U.S. at 343.

In *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972), the Court held invalid under the Equal Protection Clause a statute which prohibited picketing within a prescribed radius of a public school, because the statute exempted "picketing of any school involved in a labor dispute." The Court did not reach the question of whether the prohibition would have been valid if it had applied to all picketing; it found the statute unconstitutional because it restricted some kinds of picketing protected by the First Amendment but not others. Similarly, in *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975), the Court struck down a statute which prohibited the outdoor display of certain kinds of movies—those involving nudity —if they could be seen from a public street or public place. Again, the Court did not decide whether such a ban would be valid if it applied to all movies; it merely held that the State had failed to present a compelling justification for the particular classification which the statute established. *See also Niemotko* v. *Maryland*, 340 U.S. 268 (1951) (denial of permit to Jehovah's Witnesses to use public park violated Equal Protection Clause where such permits were granted to other groups); *Cox* v. *Louisiana*, 379 U.S. 536, 581 (1965) (concurring opinion of Black, J.) (prohibition against certain kinds of picketing but not others violates Equal Protection Clause).

In the present case, none of the asserted justifications for the trade name prohibition—even assuming they are otherwise valid—justifies a discriminatory classification limited solely to optometrists. If the use of a trade name somehow leads to inferior eye care, or to deceptive practices, or to concealment of the individual practitioner's identity or reputation, then *all* practitioners who render

eye care—not merely optometrists—should be subject to the ban. Certainly there is no "compelling" reason why only the free speech of optometrists should be restricted in this fashion.

The fact that section 5.13(d) applies only to optometrists merely makes more obvious what is in any event readily apparent from the face of the statute—namely, that the trade name ban is not designed to promote better eye care or prevent unethical or deceptive practices, but merely to restrain competition among optometrists. This provision of the Texas Optometry Act is of a piece with the prohibitions against price advertising, against window displays, and against a myriad of other competitive practices. Insulation of an industry or profession from competition may, to some degree, be within the regulatory power of a state. But it is not a sufficient justification for a prohibition, such as section 5.13(d), which directly impedes freedom of speech and the free flow of commercial information. As the Court put it in *Virginia State Board*, "Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways . . . . But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering." 425 U.S. at 770.

II.

THE INJUNCTION ENTERED BY THE DISTRICT COURT IS NOT OVERBROAD

The district court, having held that the use of a trade name is protected by the First Amendment, entered an injunction against enforcement of section 5.13(d) "or any other provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under a trade name." (Appendix to Jurisdictional Statement filed by appellants Friedman *et al*, A-3.) Appellants

argue that "[t]he only trade name provision raised by the pleadings or litigated by the parties was Section 5.13(d)," and that the court should have enjoined only the enforcement of that specific provision. We submit that the injunction is entirely valid and proper, and that the reference to "any other provision . . . which prohibits in any way the practice of optometry under a trade name" was necessary to afford complete relief and put the entire trade name controversy to rest.

The basic issue before the district court was whether Texas may constitutionally deny optometrists the right to use a trade name. Once the court determined that the state may not, the appropriate remedy was to enjoin the enforcement of any provision of the statute which might be invoked to prohibit exercise of that constitutional right. As this Court has repeatedly emphasized, a court fashioning injunctive relief "cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952) (footnote omitted); *International Salt Co.* v. *United States*, 332 U.S. 392, 400 (1947); *National Society of Professional Engineers* v. *United States*, 98 S. Ct. 1355, 1368 (1978).

Appellants complain that the district court did not identify the provisions of the statute, other than section 5.13(d), to which the injunction would apply. The district court, however, would have no way of predicting which provisions of the Act the Texas Optometry Board might invoke in proceeding against trade name use by optometrists. The purpose of the injunction was to assure that the Board would not attempt to utilize *any* other provision of the statute as a means of prohibiting trade name use, thereby evading the district court's judgment.

It is certainly conceivable that, if the injunction precluded only the enforcement of section 5.13(d), the state authorities might attempt to prevent the use of a trade name under some other section of the Act. For example, section 5.04(1) makes it unlawful for any person to

> falsely impersonate any person duly licensed as an optometrist under the provisions of this Act or to falsely *assume another name*. . . . (emphasis added.)

While this provision does not appear to be directed at trade name use, it could conceivably be construed to prohibit such use. Similarly, section 5.13(f) provides:

> No optometrist shall practice or continue to practice optometry in any office, location or place of practice where any name, names or professional identification on or about the door, window, wall, directory, or any sign or listing whatsoever, or in any manner used in connection therewith, shall indicate or tend to indicate that such office, location or place of practice is owned, operated, supervised, staffed, directed or attended by any person not actually present and practicing optometry therein during the hours such office, location or place of practice is open to the public for the practice of optometry.

Were it not for the district court's injunction, the state might attempt to use this section to prohibit the use of a trade name. The purpose of the court's injunction is to preclude the state from attempting to construe and enforce any provision of the statute in this manner.

Appellants contend that the injunction might block the enforcement of entirely valid provisions of the Act, "such as the second part of section 5.09(a) which prohibits misleading advertising or section 5.08 which prohibits optometrists from practicing while suffering from a contagious disease." (State Brief at 32) According to appellants, an optometrist who is accused of violating these provisions could argue that they cannot be enforced

against him "because they *in some way* restrict his practice of optometry under a trade name." *Id.*[13] This argument is patently frivolous. Obviously, the intent of the injunction is merely to bar the state from enforcing any prohibition against the use of trade names; it would not block the enforcement of any other, legitimate prohibition in the statute. Moreover, if at any time any party attempted to use the injunction to prevent the enforcement of some valid provision of the Act, it would always be open to appellants to seek modification or clarification of the injunction in the district court. *See National Society of Professional Engineers* v. *United States*, *supra*, 98 S. Ct. at 1368-69.

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[13] As evidence that the injunction is overbroad, appellants cite the fact that, after the decree was issued in this case, Dr. Rogers moved to have appellants cited for contempt for attempting to enforce section 5.11 of the Act, which prohibits optometrists from having window displays in their offices. This motion, however, was not based on the portion of the injunction at issue here, but rather on the portion which prohibits enforcement of the statutory prohibition against price advertising. The motion was filed in response to an effort by appellants to prevent Dr. Rogers from maintaining a window display showing various eyeglasses, sunglasses, and other ophthalmic items with prices attached to each. Despite the district court's holding that price advertising is constitutionally protected—a holding which appellants have not challenged on appeal—appellants took the position that section 5.11 could still be enforced, since that provision was not expressly mentioned in the district court's injunction. This incident, rather than supporting appellants' argument that the injunction is overbroad, demonstrates the need in this case for the kind of comprehensive injunction which the court issued.

CONCLUSION

For the reasons stated, the judgment and decree of the district court should be affirmed.

Respectfully submitted,

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August 21, 1978

APPENDIX

APPENDIX

PERTINENT PROVISIONS OF THE TEXAS OPTOMETRY ACT, TEX. REV. STAT. ANN. ART. 4552

ARTICLE 1. GENERAL PROVISIONS

* * * *

Art. 4552—1.02. Definitions

As used in this Act:

(1) The "practice of optometry" is defined to be the employment of objective or subjective means, without the use of drugs, for the purpose of ascertaining and measuring the powers of vision of the human eye, and fitting lenses or prisms to correct or remedy any defect or abnormal condition of vision. Nothing herein shall be construed to permit optometrists to treat the eyes for any defect whatsoever in any manner nor to administer nor to prescribe any drug or physical treatment whatsoever, unless such optometrist is a regularly licensed physician or surgeon under the laws of this state. Nothing herein shall be construed to prevent selling ready-to-wear spectacles or eyeglasses as merchandise at retail, nor to prevent simple repair jobs.

(2) "Ascertaining and measuring the powers of vision of the human eye" shall be construed to include:

(A) The examination of the eye to ascertain the presence of defects or abnormal conditions which may be corrected, remedied, or relieved, or the effects of which may be corrected, remedied or relieved by the use of lenses or prisms, or

(B) The employment of any objective or subjective means to determine the accommodative or refractive condition or the range or powers of vision of muscular equilibrium of the human eye, or

(C) The employment of any objective or subjective means for the examination of the human eye for the purpose of ascertaining any departure from the normal, measuring its power of vision or adapting lenses or prisms for the aid or relief thereof, and it shall be construed as a violation of this Act, for any person not a licensed optometrist or a licensed physician to do any one act or thing, or any combination of acts or things, named or described in this subdivision; provided, that nothing herein shall be construed to permit optometrists to treat the eye for any defect whatsoever in any manner, nor to administer any drug or physical treatment whatsoever, unless said optometrist is a duly licensed physician and surgeon, under the laws of this state.

(3) "Fitting lenses or prisms" shall be construed to include:

(A) Prescribing or supplying, directly or indirectly, lenses or prisms, by the employment of objective or subjective means or the making of any measurements whatsoever involving the eyes or the optical requirements thereof; provided, however, that nothing in this Act shall be construed so as to prevent an ophthalmic dispenser, who does not practice optometry, from measuring interpupillary distances or from making facial measurements for the purpose of dispensing, or adapting ophthalmic prescriptions or lenses, products and accessories in accordance with the specific directions of a written prescription signed by a licensed physician or optometrist; provided, however, the fitting of contact lenses shall be done only by a licensed physician or licensed optometrist as defined by the laws of this state, but the lenses may be dispensed by an ophthalmic dispenser on a fully written contact lens prescription issued by a licensed physician or optometrist, in which case the ophthalmic dispenser may fabricate or order the contact lenses and dispense them to the patient with appropriate instructions

for the care and handling of the lenses, and may make mechanical adjustment of the lenses, but shall make no measurements of the eye or the cornea or evaluate the physical fit of the lenses, by any means whatsoever; provided that the physician or optometrist who writes or issues the prescription shall remain professionally responsible to the patien..

(B) The adaptation or supplying of lenses or prisms to correct, relieve or remedy any defect or abnormal condition of the human eye or to correct, relieve or remedy or attempt to correct, relieve or remedy the effect of any defect or abnormal condition of the human eye.

(C) It shall be construed as a violation of this Act for any person not a licensed optometrist or a licensed physician to do any one thing or act, or any combination of things or acts, named or described in this Article.

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ARTICLE 3. EXAMINATIONS

Art. 4552—3.01. Must pass examination

Every person hereafter desiring to be licensed to practice optometry in this state shall be required to pass the examination given by the Texas Optometry Board.

Art. 4552—3.02. Application

(a) The applicant shall make application, furnishing to the secretary of the board, on forms to be furnished by the board, satisfactory sworn evidence that he has attained the age of 21 years,[1] is of good moral character, is a citizen of the United States, and has at least graduated from a first grade high school, or has a preliminary education equivalent to permit him to matriculate in The University of Texas, and that he has attended and gradu-

ated from a reputable university or college of optometry which meets with the requirements of the board, and such other information as the board may deem necessary for the enforcement of this Act.

(b) A university or school of optometry is reputable whose entrance requirements and course of instruction are as high as those adopted by the better class of universities and schools of optometry and whose course of instruction shall be equivalent to not less than six terms of eight months each, and approved by the board. Provided, however, that the provisions of this subsection shall only apply to those students enrolling in school from and after the effective date of this Act.

* * * *

Art. 4552—3.05. Subjects of examination

The examination shall consist of written, oral or practical tests, in practical, theoretical, and physiological optics, in theoretical and practical optometry, and in the anatomy, physiology and pathology of the eye as applied to optometry and in such other subjects as may be regularly taught in all recognized standard optometric universities or schools.

Art. 4552—3.06. Conduct of examination

All examinations shall be conducted in writing and by such other means as the board shall determine adequate to ascertain the qualifications of applicants and in such manner as shall be entirely fair and impartial to all individuals and every recognized school of optometry. All applicants examined at the same time shall be given the same written examination.

Art. 4552—3.07. Those passing entitled to license

Every candidate successfully passing the examination and meeting all requirements of the board shall be registered by the board as possessing the qualifications required by this law and shall receive from this board a license to practice optometry in the state.

ARTICLE 4. LICENSES—RENEWAL, REVOCATION, ETC.

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Art. 4552—4.01B Educational requirement for renewal

(a) Each optometrist licensed in this state shall take annual courses of study in subjects relating to the utilization and application of scientific, technical, and clinical advances in vision care, vision therapy, visual training, and other subjects relating to the practice of optometry regularly taught by recognized optometric universities and schools.

(b) The length of study required is 12 hours per calendar year.

(c) The continuing education requirements established by this section shall be fulfilled by attendance in continuing education courses sponsored by an accredited college of optometry or in a course approved by the board. Attendance at a course of study shall be certified to the board on a form provided by the board and shall be submitted by each licensed optometrist in conjunction with his application for renewal of his license and submission of renewal fee.

(d) The board may take action necessary in order to qualify for funds or grants made available by the United States or an agency of the United States for the establishment and maintenance of programs of continuing education.

(e) Licensees who have not complied with the requirement of this section may not be issued a renewal license, except for the following persons who are exempt:

(1) a person who holds a Texas license but who does not practice optometry in Texas;

(2) a licensee who served in the regular armed forces of the United States during part of the 12 months immediately preceding the annual license renewal date;

(3) a licensee who submits proof that he suffered a serious or disabling illness or physical disability which prevented him from complying with the requirements of this section during the 12 months immediately preceding the annual license renewal date; or

(4) a licensee first licensed within the 12 months immediately preceding the annual renewal date.

* * * *

Art. 4552—4.04. Revocation, suspension, etc.

(a) The board may, in its discretion, refuse to issue a license to any applicant and may cancel, revoke or suspend the operation of any license if it finds that:

(1) the applicant or licensee is guilty of gross immorality;

(2) the applicant or licensee is guilty of any fraud, deceit, dishonesty, or misrepresentation in the practice of optometry or in his seeking admission to such practice;

(3) the applicant or licensee is unfit or incompetent by reason of negligence;

(4) the applicant or licensee has been convicted of a felony or a misdemeanor which involves moral turpitude;

(5) the applicant or licensee is an habitual drunkard or is addicted to the use of morphine, cocaine or other drugs having similar effect or has become insane or has been adjudged by a court of competent jurisdiction to be of unsound mind;

(6) the licensee has directly or indirectly employed, hired, procured, or induced a person, not licensed to practice optometry in this state, to so practice;

(7) the licensee directly or indirectly aids or abets in the practice of optometry any person not duly licensed to practice under this Act;

(8) the licensee directly or indirectly employs solicitors, canvassers or agents for the purpose of obtaining patronage;

(9) the licensee lends, leases, rents or in any other manner places his license at the disposal or in the service of any person not licensed to practice optometry in this state;

(10) the applicant or licensee has willfully or repeatedly violated any of the provisions of this Act;

(11) the licensee has willfully or repeatedly represented to the public or any member thereof that he is authorized or competent to cure or treat diseases of the eye;

(12) the licensee has his right to practice optometry suspended or revoked by any federal agency for a cause which in the opinion of the board warrants such action;

(13) the applicant or licensee has been finally convicted of violation of Article 773 of the Penal Code.

(b) Proceedings under this section shall be begun by filing charges with the board in writing and under oath. Said charges may be made by any person or persons. The chairman of the board shall fix a time and place for a hearing and shall cause a copy of the charges, together with a notice of the time and place fixed for the hearing, to be served on the respondent or his counsel at least 10 days prior thereto. When personal service cannot be effected, the board shall cause to be published once a week

for two successive weeks a notice of the hearing in a newspaper published in the county wherein the respondent was last known to practice, and shall mail a copy of the charges and of such notice to the respondent at his last known address. When publication of the notice is necessary, the date of hearing shall not be less than 10 days after the last date of the publication of the notice.

(c) At said hearing the respondent shall have the right to appear either personally or by counsel, or both, to produce witnesses and evidence on his behalf, to cross examine witnesses and to have subpoenas issued by the board. The board shall thereupon determine the charges upon their merits.

(d) Any person whose license to practice optometry has been refused or has been revoked or suspended by the board may, within 20 days after the making and entering of such order, take an appeal to any of the district courts of the county of his residence, but the decision of the board shall not be stayed or enjoined except upon application to such district court after notice to the board.

(e) Upon application, the board may reissue a license to practice optometry to a person whose license has been revoked but such application shall not be made prior to one year after the revocation and shall be made in such manner and form as the board may require.

(f) Nothing in this Act shall be construed to prevent the administrator or executor of the estate of a deceased optometrist from employing a licensed optometrist to carry on the practice of such deceased during the administration of such estate nor to prevent a licensed optometrist from working for such person during the administration of the estate when the legal representative thereof has been authorized by the county judge to continue the operation of such practice.

ARTICLE 5. DUTIES OF LICENSEES; CONDUCT OF LICENSEES AND OTHERS

Art. 4552—5.01. Display of license

Every person practicing optometry in this state shall display his license or certificate in a conspicuous place in the principal office where he practices optometry and whenever required, exhibit such license or certificate to said board, or its authorized representative, and whenever practicing said profession of optometry outside of, or away from said office or place of business, he shall deliver to each person fitted with glasses a bill, which shall contain his signature, post-office address, and number of his license or certificate, together with a specification of the lenses and material furnished and the prices charged for the same respectively.

Art. 4552—5.02. Recordation of license

It shall be unlawful for any person to practice optometry within the limits of this state who has not registered and recorded his license in the office of the county clerk of the county in which he resides, and in each county in which he practices, together with his age, post-office address, place of birth, subscribed and verified by his oath. The fact of such oath and record shall be endorsed by the county clerk upon the license. The absence of record of such license in the office of the county clerk shall be prima facie evidence of the lack of the possession of such license to practice optometry.

Art. 4552—5.03. Optometry register

Each county clerk in this state shall purchase a book of suitable size, to be known as the "Optometry Register" of such county, and set apart at least one full page for the registration of each optometrist, and record in said optometry register the name and record of each optometrist who presents for record a license or certificate issued by the state board. When an optometrist shall have his

license revoked, suspended, or cancelled, said county clerk, upon being notified by the board, shall make a note of the fact beneath the record in the optometry register, which entry shall close the record and be prima facie evidence of the fact that the license has been so cancelled, suspended or revoked. The county clerk of each county shall, upon the request of the secretary of the board, certify to the board a correct list of the optometrists then registered in the county, together with such other information as the board may require.

Art. 4552—5.04. Practice without license; fraud; house-to-house

It shall be unlawful for any person to:

(1) falsely impersonate any person duly licensed as an optometrist under the provisions of this Act or to falsely assume another name;

(2) buy, sell, or fraudulently obtain any optometry diploma, license, record of registration or aid or abet therein;

(3) practice, offer, or hold himself out as authorized to practice optometry or use in connection with his name any designation tending to imply that he is a practitioner of optometry if not licensed to practice under the provisions of this Act;

(4) practice optometry during the time his license shall be suspended or revoked;

(5) practice optometry from house-to-house or on the streets or highways, notwithstanding any laws for the licensing of peddlers. This shall not be construed as prohibiting an optometrist or physician from attending, prescribing for and furnishing spectacles, eyeglasses or ophthalmic lenses to a person who is confined to his abode by reason of illness or physical or mental infirmity, or in

response to an unsolicited request or call, for such professional services.

Art. 4552—5.05. Treating diseased eyes

Anyone practicing optometry who shall prescribe for or fit lenses for any diseased condition of the eye, or for the disease of any other organ of the body that manifests itself in the eye, shall be deemed to be practicing medicine within the meaning of that term as defined by law. Any such person possessing no license to practice medicine who shall so prescribe or fit lenses shall be punished in the same manner as is prescribed for the practice of medicine without a license.

Art. 4552—5.06. Spectacles as premiums

It shall be unlawful for any person in his state to give, or cause to be given, deliver, or cause to be delivered, in any manner whatsoever, any spectacles or eyeglasses, separate or together, as a prize or premium, or as an inducement to sell any book, paper, magazine or any work of literature or art, or any item of merchandise whatsoever.

Art. 4552—5.07. Prescribing without examintaion

No licensed optometrist shall sign, or cause to be signed, a prescription for an ophthalmic lens without first making a personal examination of the eyes of the person for whom the prescription is made.

Art. 4552—5.08. Practice while suffering from contagious disease

No licensed optometrist shall practice optometry while knowingly suffering from a contagious or infectious disease.

Art. 4552—5.09. Advertising by optometrists

(a) No optometrist shall publish or display, or knowingly cause or permit to be published or displayed by

newspaper, radio, television, window display, poster, sign, billboard, or any other advertising media, any statement or advertisement of any price offered or charged by him for any ophthalmic services or materials, or any statement or advertisement concerning ophthalmic lenses, frames, eyeglasses, spectacles, or parts thereof which is fraudulent, deceitful, misleading, or which in any manner whatsoever tends to create a misleading impression, including statements or advertisements of bait, discount, premiums, gifts, or any statements or advertisements of a similar nature, import, or meaning.

(b) This section shall not operate to prohibit optometrists who also own, operate, or manage a dispensing opticianry from advertising in any manner permitted under any section of this bill so long as such advertising is done in the name of the dispensing opticianry and not in the name of the optometrist in his professional capacity.

Art. 4552—5.10. Advertising by dispensing opticians

(a) No person, firm or corporation shall publish or display or cause or permit to be published or displayed in any newspaper or by radio, television, window display, poster, sign, billboard or any other means or media any statement or advertisement concerning ophthalmic lenses, frames, eyeglasses, spectacles or parts thereof which is fraudulent, deceitful or misleading, including statements or advertisements of bait, discount, premiums, price, gifts or any statements or advertisements of a similar nature, import or meaning.

(b) No person, firm or corporation shall publish or display or cause or permit to be published or displayed in any newspaper, or by radio, television, window display, poster, sign, billboard or any other means or media,

any statement or advertisement of or reference to the price or prices of any eyeglasses, spectacles, lenses, contact lenses or any other optical device or materials or parts thereof requiring a prescription from a licensed physician or optometrist unless such person, firm or corporation complies with the provisions of Subsections (c)-(j) of this section.

(c) The person, firm or corporation shall obtain from the board an "Advertising Permit," which permit shall be granted to any person, firm or corporation which is engaged in the business of a dispensing optician in Texas.

(d) Such person, firm or corporation shall after receipt of such permit, but before beginning any such advertising, file with the board a list of prices which shall be charged for such eyeglasses, spectacles, lenses, contact lenses or other optical devices or materials or parts thereof in each and all of the following categories:

(1) single vision lenses;
(2) kryptok bifocal lenses;
(3) regular bifocal lenses;
(4) trifocal lenses;
(5) aphakic lenses;
(6) prism lenses;
(7) double segment bifocal lenses;
(8) subnormal vision lenses;
(9) contact lenses.

(e) No change may be made in any such price advertisement until the change has been filed with the board.

(f) Any advertisement or statement published or displayed as above described which contains the price of any of the categories shown above shall also contain the prices of all other categories and all such items, and the prices thereof, shall be published or displayed with equal promi-

nence. No advertisement which shows the price of items listed in the categories shown above shall contain any language which directly or indirectly compares the prices so quoted with any other prices of similar items. In the event an "Advertising Permit" is issued to a dispensing optician there shall be displayed prominently in each reception room and display room of each office owned or operated by such dispensing optician a complete current list of all prices on file with the board as provided above. In showing the price of "all other categories and all such items" as required by this section, it shall be permissible to combine two or more categories into one general category of "all other lenses" and designate the price thereby of "up to $———" which represents the highest price of any lenses included within this combined general category. Should there be a category in which two or more price differentials exist, it shall be permissible for the category to have a single listing in the advertisement with the lowest and the highest price in the category designated.

(g) In the event the dispensing optician owns more than one office, the prices for all such eyeglasses, spectacles, lenses, contact lenses or other optical devices or materials or parts thereof in the same category shall be the same in all offices located within the geographical limits of a county or a city regardless of the name under which such dispensing optician operates such offices.

(h) All such eyeglasses, spectacles, lenses, contact lenses, or other optical devices or materials or parts thereof must conform to standards of quality as promulgated by the American Standards Association, Inc., and commonly known as Z80.1—1964 standards.

(i) On or before April 1, of each calendar year each person, firm or corporation holding an "Advertising Permit" hereunder shall file with the board a statement

sworn to by such person or officer of such firm or corporation specifying separately for each office owned by such person, firm or corporation the percentage of the total unit sales of each such office owned by such person, firm or corporation allocated to sales of single vision lenses, bifocal lenses, trifocal lenses, contact lenses and all other lenses requiring a prescription from a licensed physician or optometrist during the prior calendar year. The person making such sworn statement shall be subject to the obligations and penalties of Article 310 of the Penal Code.

(j) All items advertised by price in accordance with this section shall be available at the advertised price without limit to quantity to all persons including, but not limited to, individuals, physicians, optometrists, dispensing opticians or the employees of any of them.

(k) Willful or repeated violation by any person, firm or corporation holding an "Advertising Permit" hereunder of any provision of Subsections (d)-(j) of this section shall be grounds for suspension of such "Advertising Permit" by the board for a period not to exceed six months. If after the expiration of such suspension, the board, after a hearing, finds that there has been a second or subsequent willful or repeated violation of any provision of Subsections (d)-(j) of this section such "Advertising Permit" shall be permanently cancelled and may not be reissued or renewed.

Art. 4552—5.11. Window displays and signs

(a) It shall be unlawful for any optometrist:

(1) to display or cause to be displayed any spectacles, eyeglasses, frames or mountings, goggles, lenses, prisms, contact lenses, eyeglass cases, ophthalmic material of any kind, optometric instruments, or optical tools or machinery, or any merchandise or advertising of a commercial nature in his office windows or reception rooms;

(2) to make use of or permit the continuance of any colored or neon lights, eyeglasses or eye signs, whether painted, neon, decalcomania, or any other either in the form of eyes or structures resembling eyes, eyeglass frames, eyeglasses or spectacles, whether lighted or not, or any other kind of signs or displays of a commercial nature in his optometric office.

(b) Any optometrist practicing optometry on or after April 15, 1969 in a manner, or under conditions, contrary to any of the provisions of this Section 5.11 by virtue of occupying premises under an existing or negotiated lease in effect on April 15, 1969, shall not be subject to the provisions of this Section 5.11 until the expiration of the primary term of the lease, or until January 1, 1979, whichever occurs sooner, but no such lease may be extended beyond the primary term by the exercise of any option. Provided, however, that as to any such lease expiring on or before June 1, 1970, such lease may be continued in effect until June 1, 1970.

Art. 4552—5.12. Basic competence

(a) In order to insure an adequate examination of a patient for whom an optometrist signs or causes to be signed a prescription for an ophthalmic lens, in the initial examination of the patient the optometrist shall make and record, if possible, the following findings of the condition of the patient:

(1) Case History (ocular, physical, occupational and other pertinent information).
(2) Far point acuity, O.D., O.S., O.U., unaided; with old glasses, if available, and with new glasses, if any.
(3) External examination (lids, cornea, sclera, etc.).
(4) Internal ophthalmoscopic examination (media, fundus, etc.).
(5) Static retinoscopy, O.D., O.S.
(6) Subjective findings, far point and near point.

(7) Phorias or ductions, far and near, lateral and vertical.
(8) Amplitude or range of accommodation.
(9) Amplitude or range of convergence.
(10) Angle of vision, to right and to left.

(b) Every prescription for an ophthalmic lens shall include the following information: interpupillary distance, far and near; lens prescription, right and left; color or tint; segment type, size and position; the optometrist's signature.

(c) The willful or repeated failure or refusal of an optometrist to comply with any of the foregoing requirements shall be considered by the board to constitute prima facie evidence that he is unfit or incompetent by reason of negligence within the meaning of Section 4.04(a)(3) of this Act, and shall be sufficient ground for the filing of charges to cancel, revoke or suspend his license. The charges shall state the specific instances in which it is alleged that the rule was not complied with. At a hearing pursuant to the filing of such charges, the person charged shall have the burden of establishing that compliance with the rule in each instance in which proof is adduced that it was not complied with was not necessary to a proper examination of the patient in that particular case.

Art. 4552—5.13. Professional responsibility

(a) The provisions of this section are adopted in order to protect the public in the practice of optometry, better enable members of the public to fix professional responsibility, and further safeguard the doctor-patient relationship.

(b) No optometrist shall divide, share, split, or allocate, either directly or indirectly, any fee for optometric services or materials with any lay person, firm or corporation, provided that this rule shall not be interpreted to

prevent an optometrist from paying an employee in the regular course of employment, and provided further, that it shall not be construed as a violation of this Act for any optometrist to lease space from an establishment on a percentage or gross receipts basis or to sell, transfer or assign accounts receivable.

(c) No optometrist shall divide, share, split or allocate, either directly or indirectly, any fee for optometric services or materials with another optometrist or with a physician except upon a division of service or responsibility provided that this rule shall not be interpreted to prevent partnerships for the practice of optometry. This Act does not prohibit an optometrist from being employed on a salary, with or without bonus arrangements, by a licensed optometrist or physician, regardless of the amount of supervision exerted by the employing optometrist or physician over the office in which the employed optometrist works, provided such bonus arrangements, if any, shall not be based in whole or in part on the business or income of any optical company.

(d) No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometroy in Texas; provided, however, that optometrists practicing as partners may practice under the full or last names of the partners. Optometrists who are employed by other optometrists shall practice in their own names, but may practice in an office listed under the name of the individual optometrist or partnership of optometrists by whom they are employed. In event of the death or retirement of a partner, the surviving partner or partners practicing optometry in a partnership name may, with the written permission of the retiring partner or the deceased optometrist's widow or other legal representative, as the case

may be, continue to practice with the name of the deceased partner in the partnership name for a period not to exceed one year from the date of his death, or during the period of administration of a deceased partner's estate as provided by Section 4.04(f) of this Act, whichever period shall be the longer.

(e) No optometrist shall use, cause or allow to be used, his name or professional identification, as authorized by Article 4590e, as amended, Revised Civil Statutes of Texas, on or about the door, window, wall, directory, or any sign or listing whatsoever, of any office, location or place where optometry is practiced, unless said optometrist is actually present and practicing optometry therein during the hours such office, location or place of practice is open to the public for the practice of optometry.

(f) No optometrist shall practice or continue to practice optometry in any office, location or place of practice where any name, names or professional identification on or about the door, window, wall, directory, or any sign or listing whatsoever, or in any manner used in connection therewith, shall indicate or tend to indicate that such office, location or place of practice is owned, operated, supervised, staffed, directed or attended by any person not actually present and practicing optometry therein during the hours such office, location or place of practice is open to the public for the practice of optometry.

(g) The requirement of Subsections (e) and (f) of this section that an optometrist be "actually present" in an office, location or place of practice holding his name out to the public shall be deemed satisfied if the optometrist is, as to such office, location or place of practice, either:

(1) physically present therein more than half the total number of hours such office, location, or place of practice

is open to the public for the practice of optometry during each calendar month for at least nine months in each calendar year; or

(2) physically present in such office, location, or place of practice for at least one-half of the time such person conducts, directs, or supervises any practice of optometry.

(h) Nothing in this section shall be interpreted as requiring the physical presence of a person who is ill, injured, or otherwise incapacitated temporarily.

(i) The requirement of Subsections (e) and (f) of this section that an optometrist be "practicing optometry" at an office, location, or place of practice holding his name out to the public shall be deemed satisfied if the optometrist regularly makes personal examination at such office, location, or place of practice of the eyes of some of the persons prescribed for therein or regularly supervises or directs in person at such office, location or place of practice such examinations.

(j) The willful or repeated failure or refusal of an optometrist to comply with any of the provisions of this section shall be considered by the board to constitute prima facie evidence that such optometrist is guilty of violation of this Act, and shall be sufficient ground for the filing of charges to cancel, revoke or suspend his license. The charges shall state the specific instance or instances in which it is alleged that the rule was not complied with. Alternatively, or in addition to the above, it shall be the duty of the board to institute and prosecute an action in a court of competent jurisdiction to restrain or enjoin the violation of any of the preceding rules.

(k) Any optometrist practicing optometry on or after April 15, 1969 in a manner, or under conditions, contrary to Subsections (b), (c), (d), and (f) of this Section 5.13 by virtue of occupying premises under an existing or

negotiated lease in effect on April 15, 1969, shall not be subject to said Subsections (b), (c), (d) and (f) of this Section 5.13 until the expiration of the primary term of the lease, or until January 1, 1979, whichever occurs sooner, but no such lease may be extended beyond the primary term by the exercise of any option. Provided, however, that as to any such lease expiring on or before June 1, 1970, such lease may be continued in effect until June 1, 1970.

Art. 4552—5.14. Lease of premises from mercantile establishment

(a) In order to safeguard the visual welfare of the public and the optometrist-patient relationship, fix professional responsibility, establish standards of professional surroundings, more nearly secure to the patient the optometrist's undivided loyalty and service, and carry out the prohibitions of this Act against placing an optometric license in the service or at the disposal of unlicensed persons, the provisions of this section are applicable to any optometrist who leases space from and practices optometry on the premises of a mercantile establishment.

(b) The practice must be owned by a Texas-licensed optometrist. Every phase of the practice and the leased premises shall be under the exclusive control of a Texas-licensed optometrist.

(c) The prescription files and all business records of the practice shall be the sole property of the optometrist and free from involvement with the mercantile establishment or any unlicensed person. Except, however, that those business records essential to the successful initiation or continuation of a percentage of gross receipts lease of space may be inspected by the applicable lessor.

(d) The leased space shall be definite and apart from the space occupied by other occupants of the premises. It shall be separated from space used by other occupants

of the premises by solid, opaque partitions or walls from floor to ceiling. Railings, curtains, and other similar arrangements are not sufficient to comply with this requirement.

(e) The leased space shall have a patient's entrance opening on a public street, hall, lobby, corridor, or other public thoroughfare. The aisle of a mercantile establishment does not comply with this requirement. An entrance to the leased space is not a patient's entrance within the meaning of this subsection unless actually used as an entrance by the optometrist's patients.

(f) No phase of the optometrist's practice shall be conducted as a department or concession of the mercantile establishment; and there shall be no legends or signs such as "Optical Department," "Optometrical Department," or others of similar import, displayed on any part of the premises or in any advertising.

(g) The optometrist shall not permit his name or his practice to be directly or indirectly used in connection with the mercantile establishment in any advertising, displays, signs, or in any other manner.

(h) All credit accounts for patients shall be established with the optometrist and not the credit department of the mercantile establishment. However, nothing in this subsection prevents the optometrist from thereafter selling, transferring, or assigning any such account.

(i) Any optometrist practicing optometry on or after April 15, 1969, in a manner, or under conditions, contrary to any of the provisions of this Section 5.14 by virtue of occupying premises under an existing or negotiated lease in effect on April 15, 1969, shall not be subject to the provisions of this Section 5.14 until the expiration of the primary term of the lease, or until January 1, 1979, whichever occurs sooner, but no such lease may be extended beyond the primary term by the

exercise of any option. Provided, however, that as to any such lease expiring on or before June 1, 1970, such lease may be continued in effect until June 1, 1970.

Art. 4552—5.15. Relationships with dispensing opticians

(a) The purpose of this section is to insure that the practice of optometry shall be carried out in such a manner that it is completely and totally separated from the business of any dispensing optician, with no control of one by the other and no solicitation for one by the other, except as hereinafter set forth.

(b) If an optometrist occupies space for the practice of optometry in a building or premises in which any person, firm, or corporation engages in the business of a dispensing optician, the space occupied by the optometrist shall be separated from the space occupied by the dispensing optician by solid partitions or walls from floor to ceiling. The space occupied by the optometrist shall have a patient's entrance opening on a public street, hall, lobby, corridor, or other public thoroughfare. An entrance is not a patient's entrance within the meaning of this subsection unless actually used as an entrance by the optometrist's patients.

(c) An optometrist may engage in the business of a dispensing optician, own stock in a corporation engaged in the business of a dispensing optician, or be a partner in a firm engaged in the business of a dispensing optician, but the books, records, and accounts of the firm or corporation must be kept separate and distinct from the books, records, and accounts of the practice of the optometrist.

(d) No person, firm, or corporation engaged in the business of a dispensing optician, other than a licensed optometrist or physician, shall have, own, or acquire any interest in the practice, books, records, files, equipment, or materials of a licensed optometrist, or have, own, or

acquire any interest in the premises or space occupied by a licensed optometrist for the practice of optometry other than a lease for a specific term without retention of the present right of occupancy on the part of the dispensing optician. In the event an optometrist or physician who is also engaged in the business of a dispensing optician (whether as an individual, firm, or corporation) does own an interest in the p ice, books, records, files, equipment or materials of another licensed optometrist, he shall maintain a completely separate set of books, records, files, and accounts in connection therewith. Any optometrist practicing optometry on or after April 15, 1969 in a manner, or under conditions, contrary to any of the provisions of this Section 5.15 by virtue of occupying premises under an existing or negotiated lease in effect on April 15, 1969, shall not be subject to the provisions of this Section 5.15 until the expiration of the primary term of the lease, or until January 1, 1979, whichever occurs sooner, but no such lease may be extended beyond the primary term by the exercise of any option. Provided, however, that as to any such lease expiring or or before June 1, 1970, such lease may be continued in effect until June 1, 1970.

(e) If, after examining a patient, an optometrist believes that lenses are required to correct or remedy any defect or abnormal condition of vision, the optometrist shall so inform the patient and shall expressly state that the patient has two alternatives for the preparation of the lenses according to the optometrist's prescription: First, that the optometrist will prepare or have the lenses prepared according to the prescription; and second, that the patient may have the prescription filled by any dispensing optician (not naming or suggesting any particular dispensing optician) but should return for an optometrical examination of the lenses. If the patient chooses the first alternative, the optometrist may refer

the patient to a particular dispensing optician for selection of frames and filling the prescription.

(f) If any person, on visiting the premises of any dispensing optician without presenting a prescription written by a licensed phyiscian or optometrist, makes any inquiry or request concerning an examination or the obtaining of any ophthalmic materials or services requiring such a prescription, then the optician or his agent or employee may not respond in any manner except to state in effect that the optician cannot examine the patient or prescribe or fit glasses or lenses, but that the patient seeking such service must go to a licensed physician or optometrist. If there is no further inquiry from the prospective patient, the optician or his agent or employee may not make any further statement of any kind. If, however, the prospective patient makes an inquiry as to where or to whom he may go to obtain such service, the optician or his agent or employee shall give the prospective patient the names and addresses of at least three persons, each of whom is either a licensed ophthalmologist or a licensed optometrist whose practice is located within a radius of five miles from the optician's place of business, or if there are fewer than three of these, the name and address of each licensed ophthalmologist or licensed optometrist whose practice is so located.

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Art. 4552—5.18. Penalty

A person who violates any provision of this Act is guilty of a misdemeanor and upon conviction is punishable by a fine of not less than $50 nor more than $500 or by confinement in the county jail for not less than two months nor more than six months, or both. A separate offense is committed each day a violation of this Act occurs or continues.

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